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Supreme Court, U.S.
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No. 08-1235 FEB 3 2009

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SUPREME COURT OF THE UNITED STATES

JAY PATTERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jay Patterson
Petitioner
33662-044
P.O. Box 700
Yankton, SD 57078

Questions Presented

Petitioner Jay Patterson's sentence was *imposed* by the District Court based upon the premise that the United States Sentencing Guidelines are presumptively reasonable.

1.) Did the sentencing court subject the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure?

2.) Petitioner was convicted of drug offenses based on evidence of methamphetamine manufacture and firearms seized during execution of a search warrant on his home that he shared with a methamphetamine addicted sometime girlfriend. Testimony was presented that shortly before the day of the search, the girlfriend had been observed making multiple trips into the house carrying unidentified material. Petitioner had told the jury about an additional witness to corroborate this testimony but on the day the additional witness was scheduled to testify, she was hospitalized. Petitioner moved the District Court for a one day continuance to obtain the additional testimony. The District Court denied the motion for continuance.

2A.) Whether the denial of a one day continuance to allow Mr. Patterson to introduce relevant and material exculpatory evidence constituted denial of petitioner's Fifth and Sixth Amendment constitutional rights to present a complete defense?

3.) Where additional error affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's supervisory power to vacate his conviction and sentence?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of *all* parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

More specifically, the Petitioner Jay Patterson and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Jay Patterson, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on 10-1-08.

OPINIONS BELOW

The 10-1-08 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2008 U.S. App. LEXIS 20803 and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 11-5-08. This opinion is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Eastern District of Missouri, entered on 11-20-07, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The United States District Court for the Eastern District of Missouri Magistrate Report & Recommendation of 6-26-07 that petitioner's motions to suppress be denied is an unpublished decision reported at 2007 U.S. Dist. LEXIS 46298 and is reprinted in the separate Appendix D to this Petition.

The United States District Court for the Eastern District of Missouri order of 7-25-07, adopting the Magistrate Report & Recommendation of 6-26-07 is an unpublished decision and is reprinted in the separate Appendix E to this Petition.

The United States District Court for the Eastern District of Missouri order of 9-6-07, denying continuance is an unpublished oral decision from the bench and is reprinted in the separate Appendix F to *this Petition.*

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 10-1-08. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 11-5-08. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case *to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

18 U.S.C. § 3553(a)provides:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such

> amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense. *Id.*

U.S.S.G. § 2D1.1, Commentary, Application Note 1 provides in relevant part:

> § 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy
>
> * * * * * * * * * *
>
> Commentary
>
> Application Notes:
>
> 1. "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. ***Mixture or substance does not include materials that must be separated from the controlled substance before the controlled***

substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.... *Id.* (As amended effective November 1, 2003) (emphasis added)

STATEMENT OF THE CASE

On or about 12-14-06 Jay Patterson was charged with violation of 26 U.S.C. § 5861(d) and 26 U.S.C. § 5871 (possession of a unregistered firearm *silencer on* or about 8-14-06) (Count 1).

These charges arose based on evidence of methamphetamine manufacture and firearms seized during execution of a search on his home that he shared with a methamphetamine addicted sometime girlfriend.

He was arraigned on or about 1-4-07 at which time he pleaded not guilty to the charged violations.

On or about 1-25-07, Jay Patterson was charged in a superseding indictment with violation of 26 U.S.C. § 5861(d) punishable under 26 U.S.C. § 5871 (possession of a unregistered firearm silencer on or about 8-14-06) (Count 1); 21 U.S.C. § 841(c)(2) and 21 U.S.C. § 841(c) (possession of approximately 202 grams of pseudoephedrine on or about 8-14-06 knowing it would be used to manufacture a controlled substance) (Count 2); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)(viii) (possession with intent to distribute a mixture or substance containing a detectable amount of methamphetamine on or about 8-14-06) (Count 3).

On 3-1-07, counsel filed a motion to suppress both evidence seized and statements made by Mr. Patterson. On 5-2-07, a hearing was held on the motion to suppress. On 6-26-07, a Magistrate Judge issued a Report and Recommendation that the motion to suppress be denied. (Appendix D) On 7-25-07, the District Court adopted the Magistrate Report & Recommendation and denied the motion to suppress. (Appendix E)

On or about 9-4-07 Mr. Patterson proceeded to trial. (Appendix B)

In opening statements, counsel advised the jury that he would present, *inter alia*, two witnesses, a husband and wife, who would provide testimony establishing the likelihood that Mr. Patterson's methamphetamine addicted sometime girlfriend, Laura Baston, had brought the contraband to Mr. Patterson's house in his absence and without his knowledge.

During the defense case, counsel called one of the two witnesses, he'd referenced in opening statement, David Johnson. Mr. Johnson testified that he and his wife, Donna Johnson, were Mr. Patterson's neighbors at the time of the search. (Tr. III. 21)[1] Mr. Johnson testified that prior to the date of Patterson's arrest, he met Laura Baston, a "shady in the face, a little dirty" woman who was frequently staying at Patterson's residence. (Tr. III. 21-22) Mr. Johnson believed her to live with Patterson. (Tr. III. 26) He recognized her presence by the car she drove, a Chevy Avalanche. *Id.* Mr. Johnson testified that during Ms Baston's presence at Patterson's residence, Johnson had more than once been approached by unknown persons he believed were looking for Ms Baston and simply had the wrong address. (Tr. III. 28-29) Mr. Johnson believed these people to be engaged in drug activity based on his observations. (Tr. III. 29) Mr. Johnson also testified that two weeks prior to Patterson's arrest, Ms Baston and an unknown male were at his residence and that she made at least a dozen trips into the house,

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[1] This refers to the trial transcript, Volume III, page 21.

carrying unknown items into the house. (Tr. III. 42-43)

At the close of the government's case, counsel for Mr. Patterson requested a continuance of one day, *or until the next morning*, to secure a witness, Ms. Donna Johnson, who was one of the two witnesses referenced in opening statement. Counsel pointed out that Ms Johnson would corroborate Mr. David Johnson, and testify that Laura Baston, had been at the Patterson residence shortly before the incident and had the opportunity to enter the home and carry unknown items in with her. Counsel pointed out that Ms. Johnson also would also testify that she had seen Baston at the residence numerous times prior to the incident when Patterson was not home. (Tr. III. 63-67)

The District Court denied the continuance and Mr. Patterson was deprived of the testimony of Ms Johnson. (Appendix F) This was in spite of the fact that the government impeached the testimony of Mr. Johnson in a manner that left Donna Johnson's testimony relevant to rehabilitate that of Mr. Johnson (Tr. III. 58-59) because Ms Johnson could have testified to many calls made to the local police department regarding Laura Baston and her associates, whom the Johnsons believed to be involved with drugs. *Id.* It was also in spite of the fact that the absence of Ms Johnson's testimony left the government the opportunity, which they promptly took advantage of, to argue in closing argument that the defense rested only on the testimony of Mr. Johnson. (Tr. III. 144)

On 9-7-07, Mr. Patterson was found guilty by the jury as to violation of 26 U.S.C. § 5861(d) punishable under 26 U.S.C. § 5871 (possession of a

unregistered firearm silencer on or about 8-14-06) (Count 1); 21 U.S.C. § 841(c)(2) and 21 U.S.C. § 841(c) (possession of approximately 202 grams of pseudoephedrine on or about 8-14-06 knowing it would be used to manufacture a controlled substance) (Count 2); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)(viii) (possession with intent to distribute a mixture or substance containing a detectable amount of methamphetamine on or about 8-14-06) (Count 3).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 28 and a Criminal History of "I" which resulted in a guideline sentencing range 78-97 months. The Total Offense Level was predicated on a Base Offense Level of 26 for 54.76 grams of methamphetamine listed in ¶¶11 and 19 of the Presentence Report. Notably, these 54.76 grams were almost entirely 'leftovers' or waste water etc from the manufacture of methamphetamine and would have had to have been separated from the methamphetamine before it was used. The Probation Officer acknowledged that Mr. Patterson had a serious and ongoing problem with addiction to cocaine, but declined to recommend a downward variance in Mr. Patterson's sentence or guideline sentencing range. (Presentence Report ¶¶44, 77)

On 11-20-07, Mr. Patterson appeared for sentencing. At sentencing, the District Court simply adopted the Presentence Report and imposed a sentence at the bottom of the guideline sentencing range. The District Court made no reference what-so-ever to 18 U.S.C. § 3553(a) or the factors therein. (Transcript Sentencing, 11-20-07)

On 11-20-07, Mr. Patterson was sentenced to 78 months incarceration for violations of 26 U.S.C. § 5861(d) punishable under 26 U.S.C. § 5871 (possession of a unregistered firearm silencer on or about 8-14-06) (Count 1); 21 U.S.C. § 841(c)(2) and 21 U.S.C. § 841(c) (possession of approximately 202 grams of pseudoephedrine on or about 8-14-06 knowing it would be used to manufacture a controlled substance) (Count 2); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)(viii) (possession with intent to distribute a mixture or substance containing a detectable amount of methamphetamine on or about 8-14-06) (Count 3). This sentence represented the bottom of the guideline sentencing range with no downward variance. The sentence also included relevant conduct involving 54.76 grams of methamphetamine which, in fact, was mostly waste material and would have had to be separated from the methamphetamine before it was used. (Appendix B)

The judgment was entered on 11-20-07.

On 11-30-07, a Notice of Appeal was filed. On direct appeal, counsel argued, *inter alia*, that Mr. Patterson was denied his Fifth Amendment and Sixth Amendment constitutional rights to a complete defense by the District Court's denial of the overnight continuance to allow Mr. Patterson to present the testimony of Ms Johnson.

On 10-1-08, the Court of Appeals denied Mr. Patterson's appeal. In denying the appeal, the Court of Appeals held, *inter alia*,

> Patterson argues that the district court erred in denying his motion for a continuance after his final witness, Donna Johnson, became unavailable

> due to illness. We will not overturn a district court's denial of a continuance absent a clear abuse of discretion. See United States v. Young, 943 F.2d 24, 25 (8th Cir. 1991). Here, the district court had already granted one continuance for Johnson to testify, and it found that her testimony would be cumulative and would not rehabilitate another defense witness. We conclude that the district court did not abuse its discretion in denying the continuance.

United States v. Jay Patterson, 2008 U.S. App. LEXIS 20803 (8th Cir. 10-1-08)

Counsel timely filed a petition for rehearing in which he again specifically argued that Mr. Patterson was denied his Fifth Amendment and Sixth Amendment constitutional rights to a complete defense by the District Court's denial of the overnight continuance to allow Mr. Patterson to present the testimony of Ms Johnson. On 11-5-08, the Court of Appeals denied rehearing. (Appendix C)

Mr. Patterson demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) **THIS COURT SHOULD GRANT MR. PATTERSON'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of

> another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[2] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

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[2] See also *GACA v. United States,* 411 U.S. 618 (1973); *United States v. Jacobs,* 429 U.S. 909 (1976); *Rea v. United States,* 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens,* 375 U.S. 162 (1963); *Elkins v. United States,* 364 U.S. 206 (1960)..

McNabb, 318 U.S. at 340.

1A.) The Sentencing Court Failed To Subject The Defendant's Sentence To The Thorough Adversarial Testing Contemplated By Federal Sentencing Procedure

In *Apprendi v. New Jersey*, 530 U.S. ___, 147 L.Ed.2d 435, 120 S.Ct. 2348, 2000 U.S. LEXIS 4304 (6-26-00), the Supreme Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

In *Blakely v. Washington*, 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573 (6-24-04), the Supreme Court clarified that *Apprendi* applies anytime facts supporting a criminal defendant's sentence are neither admitted by the defendant in a plea colloquy nor found by a jury. The Court added that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *Id.* 2004 U.S. LEXIS 4573 at **14. (quoting *Ring v. Arizona*, 536 U.S. 584, 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002)).

In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05), Justice Stevens, writing for the Supreme Court, held that *Blakely* and *Apprendi* applied to the United States Sentencing Guidelines ("Guidelines") or "Sentencing Reform Act of 1984" ("Act"), in

addition to the United States Code. In a separate opinion written by Justice Breyer for a different 5-4 majority in *Booker*, however, the impact of the Stevens' opinion was held to be that the *Guidelines* can no longer be mandatory, although judges must consult them, subject to an appeals court's review based on a standard of "reasonableness". In reaching this result, the Supreme Court excised 18 U. S. C. §3553(b)(1) (Supp. 2004) which is the provision of the United States Code that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure). The Supreme Court also excised 18 U.S.C. § 3742(e) (main ed. and Supp. 2004), which is the provision that sets forth standards of review on appeal, including de novo review of departures from the applicable Guidelines range. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 **69-73 (1-12-05).

The Court also specifically cited the factors set forth in 18 U.S.C. § 3553(a) as guidance for the imposition and review of sentences. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 768-769; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05).

In *Rita v. United States*, No. 05-4674; 2007 U.S. LEXIS 8269 (6-21-07), the Court addressed whether a Court of Appeals could apply a presumption of reasonableness to sentences within the guideline sentencing range of the United States Sentencing Guidelines. Answering this question in the affirmative, the Court held that a Court of Appeals may adopt a non-binding presumption that a sentence within the guideline sentencing range of the United States Sentencing Guidelines is reasonable.

The Supreme Court emphasized, however, that the presumption of reasonableness "is an *appellate* court presumption", not a tool for determination of a sentence by the District Court. *Rita v. United States*, No. 05-4674; 2007 U.S. LEXIS 8269 **17-25 (6-21-07) (emphasis in *Rita*). The Court explained:

> We repeat that the presumption before [*24] us is an *appellate* court presumption. Given our explanation in *Booker* that appellate "reasonableness" review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U.S.C. § 3552(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, U.S.S.G. § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless. See Rule 32(f). Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. See Rules

> 32(f), (h), (i)(1)(C) and (i)(1)(D); see also *Burns v. United States*, 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991) (recognizing importance of notice [*25] and meaningful opportunity to be heard at sentencing). In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply. *Booker*, 543 U.S., at 259-260, 125 S. Ct. 738, 160 L. Ed. 2d 621.

Rita v. United States, No. 05-4674; 2007 U.S. LEXIS 8269 **23-25 (6-21-07) (emphasis in *Rita*)

In Mr. Patterson's case, as set forth above, he was sentenced to 78 months incarceration without the District Court considering anything but the "guideline sentencing range". Instead of subjecting Mr. Patterson's sentence to the thorough adversarial testing contemplated by federal sentencing procedure and *Rita v. United States*, No. 05-4674; 2007 U.S. LEXIS 8269 (6-21-07), the District Court didn't even 'pay lip service' to 18 U.S.C. § 3553(a) or the factors therein.

Based on the foregoing facts and law, the judgment affirming Mr. Patterson's sentence should be vacated and the case remanded to ascertain that his sentence was subjected to the thorough adversarial testing contemplated by federal sentencing procedure. *Rita v. United States*, No. 05-4674; 2007 U.S. LEXIS 8269 **23-25 (6-21-07).

1B.) The Trial Court's Denial Of A One Day Continuance To Allow Mr. Patterson To Introduce Relevant And *Material* Exculpatory Evidence Constituted Denial Of Petitioner's Fifth And Sixth Amendment Constitutional Rights To Present A Complete Defense

Whether rooted in the Due Process Clause of the Fifth Amendment or in the Compulsory Process Clause of the Sixth Amendment, the Constitution guarantees criminal defendants the right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."); *Washington v. Texas*, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *United States v. Molina*, 407 F.3d 511; 2005 U.S. App. LEXIS 9041 **25 (1st Cir. 2005) (same); *United States v. Hudson*, 970 F.2d 948; 1992 U.S. App. LEXIS 16608 (1st Cir. 1992); *United States v. Blum*, 62 F.3d 63; 1995 U.S. App. LEXIS 20605 **11-12 (2nd Cir. 1995) (citing *United States v. Almonte*, 956 F.2d 27, 30 (2nd Cir. 1992)).

At issue in *Washington* was a Texas procedural rule that barred persons charged or convicted as coparticipants in the same crime from testifying on behalf of each other, although they could testify freely for the state. *Washington*, 388 U.S. 14, 15, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967). As a result of this rule, the petitioner was prevented from offering the relevant, exculpatory testimony of an accomplice,

already convicted in connection with the same homicide. Finding that the petitioner's Sixth Amendment right to compulsory process was implicated, the Supreme Court first discussed the contours of this right:

> The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.
>
> . . .
>
> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Id. at 18-19. The Court examined the state's justifications for the rule barring the accomplice testimony. Finding that the rule could not be rationally defended, the Court noted that the Constitution is violated by "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief." *Id.* at 22. Because the Texas rule arbitrarily prevented the defense from using testimony otherwise recognized as relevant and competent, the Court held that the petitioner's fundamental due process rights had been violated. *Id.* at 23.

In *Chambers*, the strict application of certain Mississippi rules of evidence thwarted the petitioner's attempts to present his version of the facts during his murder trial. *Chambers*, 410 U.S. 284, 289, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). Based on the state's common-law rule that a party may not impeach his own witness, the trial court denied the petitioner's request to adversely cross-examine a man who had confessed to the murder and then repudiated the confession. *Id.* at 295. In addition, the hearsay rule barred the petitioner from introducing the testimony of three witnesses to whom the other man had confessed, and under circumstances that tended to assure reliability. *Id.* at 298-99. The Court considered the combined effect of these rules under the unusual facts of the case and held that their strict application deprived the petitioner of a fundamentally fair trial. *Id.* at 302-03. In so holding, the Court noted that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

The Court's decisions in *Chambers* and *Washington* have been applied by the lower courts to vacate convictions and sentences where a court's ruling deprives a criminal defendant of material exculpatory evidence; the right to present a complete defense. *Chia v. Cambra,* 360 F.3d 997; 2004 U.S. App. LEXIS 4202 (9th Cir. 2004); *Ellis v. Mullin,* 312 F.3d 1201; 2002 U.S. App. LEXIS 25257 (10th Cir. 2002); *Greene v. Lambert,* 288 F.3d 1081; 2002 U.S. App. LEXIS 4854 (9th Cir. 2002); *United States v. Blum,* 62 F.3d 63; 1995 U.S. App. LEXIS 20605 (2nd Cir. 1995); *United States v. Morales,* 108 F.3d 1031;

1997 U.S. App. LEXIS 3783 (9th Cir. 1997); *United States v. Shay*, 57 F.3d 126; 1995 U.S. App. LEXIS 15360 (1st Cir. 1995).

In Mr. Patterson's case, as set forth above, in opening statements, counsel advised the jury that he would present, *inter alia*, two witnesses, a husband and wife, who would provide testimony establishing the likelihood that Mr. Patterson's methamphetamine addicted sometime girlfriend, Laura Baston, had brought the contraband to Mr. Patterson's house in his absence and without his knowledge.

During the defense case, counsel called one of the two witnesses, he'd referenced in opening statement, David Johnson. Mr. Johnson testified that he and his wife, Donna Johnson, were Mr. Patterson's neighbors at the time of the search. (Tr. III. 21)[3] Mr. Johnson testified that prior to the date of Patterson's arrest, he met Laura Baston, a "shady in the face, a little dirty" woman who was frequently staying at Patterson's residence. (Tr. III. 21-22) Mr. Johnson believed her to live with Patterson. (Tr. III. 26) He recognized her presence by the car she drove, a Chevy Avalanche. *Id.* Mr. Johnson testified that during Ms Baston's presence at Patterson's residence, Johnson had more than once been approached by unknown persons he believed were looking for Ms Baston and simply had the wrong address. (Tr. III. 28-29) Mr. Johnson believed these people to be engaged in drug activity based on his observations. (Tr. III. 29) Mr. Johnson also testified that two weeks prior to Patterson's arrest, Ms Baston

---

[3] This refers to the trial transcript, Volume III, page 21.

and an unknown male were at his residence and that she made at least a dozen trips into the house, carrying unknown items into the house. (Tr. III. 42-43)

At the close of the government's case, counsel for Mr. Patterson requested a continuance of one day, or until the next morning, to secure a witness, Ms. Donna Johnson, who was one of the two witnesses referenced in opening statement. Counsel pointed out that Ms Johnson would corroborate Mr. David Johnson, and testify that Laura Baston, had been at the Patterson residence shortly before the incident and had the opportunity to enter the home and carry unknown items in with her. Counsel pointed out that Ms. Johnson also would also testify that she had seen Baston at the residence numerous times prior to the incident when Patterson was not home. (Tr. III. 63-67)

The District Court denied the continuance and Mr. Patterson was deprived of the testimony of Ms Johnson. (Appendix F) This was in spite of the fact that the government impeached the testimony of Mr. Johnson in a manner that left Donna Johnson's testimony relevant to rehabilitate that of Mr. Johnson (Tr. III. 58-59) because Ms Johnson could have testified to many calls made to the local police department regarding Laura Baston and her associates, whom the Johnsons believed to be involved with drugs. *Id.* It was also in spite of the fact that the absence of Ms Johnson's testimony left the government the opportunity, which they promptly took advantage of, to argue in closing argument that the defense rested only on the testimony of Mr. Johnson. (Tr. III. 144)

On 9-7-07, Mr. Patterson was found guilty by the jury.

Based on the foregoing facts and law, Mr. Patterson was denied his Fifth Amendment and Sixth Amendment constitutional rights to present a complete defense. *Id.*

1C.) Additional Error In The Courts Below Mandate That Mr. Patterson's Conviction And/Or Sentence Be Vacated.

As set forth above, on 11-20-07, Mr. Patterson was sentenced to 78 months incarceration for, *inter alia*, violations of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)(viii) (possession with intent to distribute a mixture or substance containing a detectable amount of methamphetamine on or about 8-14-06) (Count 3). This sentence included relevant conduct involving 54.76 grams of methamphetamine which, in fact, was mostly waste material and would have had to be separated from the methamphetamine before it was used. (Appendix B)

U.S.S.G. § 2D1.1, Commentary, Application Note 1 provides in relevant part, "***Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used.*** Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance." *Id.*

Based on the foregoing, Mr. Patterson's sentence is violative of U.S.S.G. § 2D1.1, Commentary, Application Note 1.

This claim is submitted to preserve Mr. Patterson's right to raise it in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach its merits.

Based on the foregoing, the decision by the Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States,* 318 U.S. 332 (1943); *GACA v. United States,* 411 U.S. 618 (1973); *United States v. Jacobs,* 429 U.S. 909 (1976); *Rea v. United States,* 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens,* 375 U.S. 162 (1963); *Elkins v. United States,* 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Eighth Circuit in Mr. Patterson's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Jay Patterson respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[4] to the court of appeals for reconsideration in light of *Rita v. United States*, No. 05-4674; 2007 U.S. LEXIS 8269 (6-21-07) and/or *Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)

Jay Patterson
Petitioner
33662-044
P.O. Box 700
Yankton, SD 57078

Date: _____

[4] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

SUPREME COURT OF THE UNITED STATES

JAY PATTERSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Jay Patterson and submits the attached appendix pursuant to Supreme Court Rules.

Date: _____

_____

Jay Patterson
Petitioner
33662-044
P.O. Box 700
Yankton, SD 57078

APPENDIX A
ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED 10-1-08

2008 U.S. App. LEXIS 20803, *

United States of America, Plaintiff -- Appellee, v. Jay Scott Patterson, Defendant -- Appellant.

No. 07-3791

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2008 U.S. App. LEXIS 20803

September 23, 2008, Submitted

October 1, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of Missouri. United States v. Patterson, 2007 U.S. Dist. LEXIS 46298 (E.D. Mo., June 26, 2007)

COUNSEL: For United States, Plaintiff - Appellee: Jeanette Suzanne Graviss, Special Assistant U.S. Attorney, Raymond M. Meyer, Assistant U.S., Attorney, U.S. ATTORNEY'S OFFICE, Eastern District of Missouri, St. Louis, MO.

Jay Scott Patterson (Federal Prisoner: 33662-044), Defendant - Appellant, Pro se, Pharr, TX.

For Jay Scott Patterson (Federal Prisoner 33662-044), Defendant - Appellant: Natt Scott Rosenblum, ROSENBLUM & SCHWARTZ, St. Louis, MO.

JUDGES: Before MURPHY, ARNOLD, and BENTON, Circuit Judges.

OPINION

PER CURIAM.

Jay Scott Patterson was convicted by a jury of possession of an unregistered firearm silencer, 26 U.S.C. § 5861(d), possession of pseudoephedrine with

intent to manufacture, id. § 841(c), and possession of methamphetamine with intent to distribute, id. § 841(a)(1). He appeals, claiming that he did not voluntarily consent to the search of his home, that the district court 1 should have granted his motion for a continuance, and that the evidence was insufficient to support his conviction. We affirm.

FOOTNOTES

1 The Honorable Henry E. Autrey, United States District Court for the Eastern District of Missouri.

Patterson contends [*2] that he did not voluntarily consent to the search and that the court erred in denying his motion to suppress. We review the denial of a motion to suppress de novo, but review the district court's underlying factual determinations for clear error. United States v. Martinez, 358 F.3d 1005, 1008 (8th Cir. 2004). To determine whether consent is voluntary we consider "the totality of the circumstances, including characteristics of the accused and details of the interrogation." United States v. Luna, 368 F.3d 876, 878 (8th Cir. 2004). Law enforcement officers sought permission to search Patterson's home and interpreted from his gesture that he had granted consent. In the home the officers saw evidence of methamphetamine production in plain view. Patterson was arrested and a search warrant obtained, after which the officers discovered more evidence of methamphetamine production, several firearms, and a silencer. Patterson argues that his consent to enter was coerced because a number of officers had come to his door, others had set up a

perimeter around his house, and he was unaware of his rights. These arguments differ from those made to the district court, however, where Patterson argued [*3] that he withdrew his consent after the *officers were already in his house*. We conclude the district court did not clearly err in finding that Patterson voluntarily consented to the entry of the officers.

Patterson argues that the district court erred in denying his motion for a continuance after his final witness, Donna Johnson, became unavailable due to illness. We will not overturn a district court's denial of a continuance absent a clear abuse of discretion. See United States v. Young, 943 F.2d 24, 25 (8th Cir. 1991). Here, the district court had already granted one continuance for Johnson to testify, and it found that her testimony would be cumulative and would not rehabilitate another defense witness. We conclude that the district court did not abuse its discretion in denying the continuance.

Finally, Patterson contends that the court erred in denying his motion for judgment of acquittal. A judgment of acquittal is required if the evidence is insufficient to sustain a conviction. Fed. R. Civ. P. 29(a). We review challenges to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government and accepting all reasonable inferences in favor [*4] of the verdict. United States v. Garcia, 521 F.3d 898, 901 (8th Cir. 2008). Patterson argues that because the evidence showed that his ex girlfriend Laura Baston had access to the residence, and could have introduced items into the home, the government had not proved beyond a reasonable

doubt that Patterson knowingly possessed the silencer and drug related evidence. We conclude that the government introduced sufficient evidence to support a jury determination that Patterson knew about the materials in his house, and to sustain the guilty verdict on all three counts.

The judgment of the district court is affirmed.

APPENDIX B
JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI
ENTERED 11-20-07

ENTERED NOVEMBER 20, 2007
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
JUDGEMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA,
v.
JAY SCOTT PATTERSON

Case Number: SI-4:06CR00761HEA
USM Number: 33662-044
Frank K. Carlson
Defendant's Attorney

THE DEFENDANT:
[x] pleaded guilty to count(s) 1, 2 and 3.
[ ]pleaded nolo contendere to count(s) which was accepted by the court
[ ]was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty on these offenses:

Title & Section: 26 U.S.C. § 5861 Q and punishable under 26 USC 5871
Nature of Offense: Possession of a Firearm Silencer
Date Offense Concluded: August 14, 2006
Count Number(s): 1
Title & Section: 21 U.S.C. § 841(c)(2) and punishable under 21 USC 841(c)
Nature of Offense: Possession of Pseudoephedrine Knowing it Would be Used to manufacture a Controlled Substance

Date Offense Concluded: August 14, 2006
Count Number(s): 2
Title & Section: 21 USC841(a)(1) and punishable under 21 USC 841(b)(1)(B)(viii)
Nature of Offense: Possession With the Intention to Distribute Methamphetamine
Date Offense Concluded: August 14, 2006
Count Number(s): 3

The defendant is sentenced as provided in pages 2 through 7 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)_____
[] Count(s)_____dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 20, 2007
Date of Imposition of Judgment

Signature of Judge
/SS/
Henry E. Autrey
UNITED STATES DISTRICT JUDGE

Name & Title of Judge

November 20, 2007
Date signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 78 months.

The term consists of 78 months on each of Counts one through three to be served concurrently.

It is recommended that the defendant be evaluated for participation in the Residential Drug Abuse Program if this is consistent with the Bureau of Prisons policies.

[x] The Court makes the following recommendations to the Bureau of Prisons:
If defendant qualifies, defendant be placed in the facility in Yankton, SD.
[x] The defendant is remanded to the custody of the United States Marshal.
[] The defendant shall surrender to the United States Marshal for this district
[] at _____ am/pm on _____
[] as notified by the United States Marshal.
[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] by2 p.m. on _____
[] as notified by the United States Marshal.

[] as notified by the Probation or Pretrial Services Office.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years. This term consists of a term of two years on each of counts one and two and four years on count three, all such terms to run concurrently.
The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)
[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)
[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[] The Defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete wrr['ten report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;

7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of commencement of supervision and at least two periodic drug tests thereafter for use of a controlled substance.

The defendant shall participate in a drug or alcohol abuse treatment program approved by the United States Probation Office, which may include substance abuse testing, counseling, residence in a Community Corrections Center, residence in a Comprehensive Sanctions Center, Residential Re-Entry Center, or inpatient treatment in a treatment center or hospital. The defendant shall pay for the costs associated with substance abuse services based on a co-payment fee established by the United States Probation Office. Co-payments shall never exceed the total cost of services provided.

The defendant shall submit his/her person, residence, office, or vehicle to a search conducted by the United States Probation Office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

The defendant shall provide the probation officer and the Financial Litigation Unit (FLU) of the U.S. Attorney's Office with the access to any requested financial information. The defendant is advised that the probation office may share financial information with FLU.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or other anticipated or unexpected financial

gains to the outstanding Court-ordered financial obligation. The defendant shall immediately notify the probation officer of the receipt of any indicated monies.

The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without the approval of the United States Probation Office so long as there is a balance on the Court-imposed financial obligation.

The defendant shall pay the fine as previously ordered by the Court.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on sheet 6

Assessment: $300.00
Fine: $12,500.00
Restitution:

[] The determination of restitution is deferred until _____. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such a determination.

[] The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee Total Loss* Restitution Ordered Priority or Percentage
Totals _____
[] Restitution amount ordered pursuant to plea agreement ___

[] The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after Me date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:
[] The interest requirement is waived for the [] and/or [] restitution.
[] The interest requirement for the [] fine [] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 11 OA, and I I 3A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:
A [x] Lump sum payment of $300.00 due immediately, balance due
[] not later than ___ _____; or

[] in accordance with [] C, [] D, or [] E below; or [] F below; or
B [] Payment to begin immediately (may be combined [] C, [] D, or [] E below; or [] F below; or
C [] Payment in _____ (e.g. equal, weekly, monthly, quarterly) installments of ____ over a period of _____ e.g. months or year(s), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
D [] Payment in _____ (e.g. equal, weekly, monthly, quarterly) installments of ____ over a period of _____ e.g. months or year(s), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
E [] Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The Court will set the payment plan based on an assessment of the defendant's ability to pay at this time; or
F [x] Special instructions regarding the payment of criminal monetary penalties:
The ordered Special Assessment of $300.00 shall be dure immediately. The ordered fine of $12,500.00 shall be paid as instructed on page 7 of this judgment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court,

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

[] Joint and Several

Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

[] The defendant shall pay the cost of prosecution.
[] The defendant shall pay the following court costs(s):
[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

FURTHER ORDERED the defendant shall pay to the United States a fine of $12,500 as to count 1.

The defendant shall pay all criminal monetary penalties through the Clerk of Court. If the defendant cannot pay in full immediately, then the defendant shall make payments under the following minimum payment schedule: during incarceration, it is recommended that the defendant pay criminal monetary penalties through an installment plan in

accordance with BOP Prisons' Inmate Financial Responsibility Program at the rate of 50% of the fund available to the defendant. If the defendant owes any criminal monetary penalties when released from incarceration, then the defendant shall make payments in monthly installments of at least $300.00, or no less than 10% of the defendant's gross earnings, whichever is greater, with payments to commence no later than 30 days after release of imprisonment, Until all criminal monetary penalties are paid in full, the defendant shall notify the court and this districts US Attorney's Office, Financial Litigation Unit, of any material changes in the defendant's economic circumstances that might affect the defendant's ability to pay the criminal monetary penalties. The defendant shall notify this district's United States Attorney's Office, Financial Litigation Unit, of any change in mailing or residence address that occurs while any portion of the criminal monetary penalties remains unpaid.

It is recommended that the defendant participate in the Financial Responsibility Program while incarcerated, if that is consistent with the Bureau of Prisons policies.

APPENDIX C
ORDER OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED 11-5-08

UNITED STATES COURT OF APPEALS
FOR 'THE EIGHTH CIRCUIT
No: 07-3791
United States of America,
Appellee
v.
Jay Scott Patterson,
Appellant

Appeal from U.S. District Court
for the Eastern District of Missouri - St. Louis
(4:06-cr-00761-HEA-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Raymond W. Gruender took no part in the consideration or decision of this matter.

November 05, 2008 Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D
USDC MAGISTRATE R&R
DATED 6-26-07

2007 U.S. Dist. LEXIS 46298, *
UNITED STATES OF AMERICA, Plaintiff, v. JAY SCOTT PATTERSON, Defendants.
No. 4:06CR761 HEA
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION
2007 U.S. Dist. LEXIS 46298
June 26, 2007, Decided
June 26, 2007, Filed

COUNSEL: [*1] For Jay Scott Patterson (1), Defendant: Frank K. Carlson, CARLSON LAW FIRM, Union, MO.

For USA, Plaintiff: Raymond M. Meyer, LEAD ATTORNEY, OFFICE OF U.S. ATTORNEY, St. Louis, MO.

JUDGES: Terry I. Adelman, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Terry I. Adelman

OPINION

MEMORANDUM AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The above matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). The Defendant filed a Motion to Suppress Statements (Doc. # 20), and a Motion to Suppress Evidence (Doc. # 21). A hearing was held on the motions to suppress on May 2, 2007. In addition, after the hearing, the parties were ordered to file supplemental briefs, and the briefing was completed by May 25, 2007.

Based upon the evidence adduced at the hearing on the motions to suppress, the undersigned

makes the following findings of fact and conclusions of law:

Findings of Fact

Darryl Balleydier is a detective with the Franklin County Drug Task Force. In August, 2006, and in the months immediately prior to that time, detectives of the Task Force received information from two different sources that the Defendant was involved in the manufacture and use of methamphetamine. In order to [*2] further this investigation, on August 14, 2006, Balleydier went to the Defendant's residence at 1926 Mike Allen Drive in Washington, Missouri. He and three other detectives were present at the residence and knocked on the door of his house. The Defendant came to the door and the detectives asked the Defendant if they could come into the house. The Defendant opened the door wide, and motioned for the officers to come into the house.

The Defendant asked one of the detectives (Det. Scott) to sit down on the couch in the living room. Scott told the Defendant that he was with the Franklin County Drug Task Force, and the detectives had received information that the Defendant might be involved in methamphetamine use and wanted to question him about that possible activity. The Defendant agreed to talk to them.

Shortly after entering the house, Balleydier smelled the odor of burned marijuana and asked Patterson if anyone else was present in the house. When Patterson said that no one else was in the house, the detectives asked the Defendant if it was okay to look around the house to make sure there were no other individuals in the residence. Patterson told the detectives that he fully understood [*3] why

they would want to make sure that no one else was in the house, and that they were welcome to look around for other people. No threats or promises were made to the Defendant in order to obtain his consent to look around the house to determine if other persons were present. As Det. Balleydier was conducting the cursory sweep of the house, he observed in plain view on a sink in the bathroom a pair of hemostats with burned residue on them. On a shelf near the basement steps, he observed a can of solvent which appeared to be denatured alcohol, and also observed lithium batteries. On the floor of the basement, also in plain view, Balleydier observed the corner of a plastic baggie and a piece of tin foil with burned residue. On the bar in the basement, the detective observed a mason jar containing a liquid of unknown origin, and on the floor in this general area observed two, one-gallon cans of Coleman camp fuel or starter fluid. After observing the above items, which Balleydier knew from his experience were used in the manufacture or use of methamphetamine, he returned to the living room area and informed the Defendant what he had observed during the limited search.

He told the Defendant [*4] that the items appeared to be items which were involved in the manufacture or use of methamphetamine, and asked Patterson for permission to search the house. Patterson said that before deciding whether to allow the search, he wanted to first call his brother who was an ATF agent. Balleydier told the Defendant that was fine with him, and told him to go ahead and use the phone. The Defendant then retrieved his cell phone (which contained the Defendant's brother's number), and called someone and began talking to a

person who he identified as his brother. After a period of conversation, Balleydier heard the person on the phone yelling at Patterson. At this point, Patterson became agitated and started talking loudly to the detectives telling them that they needed to get out of his house because they were violating his "Fourth Amendment rights." Balleydier asked the Defendant if he was refusing to grant permission to search his house, and he said that he was. Balleydier told the Defendant that that was fine and it was his decision to make, but that Balleydier and the detectives would go to the prosecutor and the court and attempt to get a warrant to search the Defendant's house. He told [*5] the Defendant that during the interim, in order to preserve the scene, the Defendant would have to wait outside while the detectives applied for a warrant. The Defendant stated that he was not going anywhere, and told the detectives that he would not leave his house, that he could not be forced to leave his house, and that they should leave his house immediately. At this point, because the Defendant continued his resistance and hostile demeanor, he was placed under arrest for possession of drug paraphernalia and handcuffed. He was placed on the front porch, and a marked unit from the Washington, Missouri police department picked him up and took him to the police station.

At this point, Balleydier went to the Franklin County Prosecutor's Office and prepared a search warrant application and affidavit in support of the application. He obtained the prosecuting attorney's approval for the warrant, and the prosecutor signed the application. Balleydier then went to Judge Williams of the Franklin County Circuit Court and applied for a warrant to search the Defendant's

house at 1926 Mike Allen Drive, Washington, Missouri, and to seize marijuana, methamphetamine, drug paraphernalia, clandestine [*6] laboratory equipment, chemicals and artifacts, *records pertaining to drug sales* and on manufacturing, computers and all computer-related equipment, discs and accessories, and firearms. The affidavit, which Balleydier swore was true and correct, stated in substance the following:

The detectives went to the Defendant's house because they received information that the resident of the house was involved in the manufacture and distribution of methamphetamine, and the Defendant was *the sole* resident of the house. Balleydier recounted that he and other detectives had been allowed admission to the residence by the Defendant. Upon entering the residence, Balleydier smelled burned marijuana and asked the Defendant for permission to look around the house for other people. He stated that the Defendant gave permission to look around the house for other occupants. During this search for other occupants, Balleydier said that several items were observed in plain view. In the master bathroom lying on a sink countertop, Balleydier observed a pair of hemostats with burned residue. Further, on a shelf in the basement stairway, Balleydier located a gallon can of solvent which he believed to be denatured [*7] alcohol and with the solvent, he also observed a lithium battery. Balleydier told the judge that he is familiar with both those items, and knows that they are used in the manufacture of methamphetamine. Further, on the basement floor next to a bar, Balleydier observed a corner of a plastic bag and a piece of tin foil with burned residue. Balleydier told

the judge that based on his experience, he knows that plastic bag corners are commonly cut off to package methamphetamine, and also that small pieces of tin foil are used to both store and later smoke methamphetamine. Balleydier also observed on the bar in the basement, a mason jar filled with liquid which was of an unknown type. Belleydier stated that, based on his experience, he knows that in the process of manufacturing methamphetamine, chemicals are altered and processed in mason jars leaving unknown liquids. Balleydier also observed on the floor two cans of camp fuel or Coleman fuel. Balleydier also told the judge that, based on his experience, Coleman fuel is one of the necessary ingredients for the manufacture of methamphetamine. The affidavit also states that generally within Balleydier's training and experience and participation [*8] in other investigations, he knows that drug dealers normally maintain books, records, controlled substances, financial instruments, checks, and other items which are indications of drug dealing.

Based on the above affidavit, Judge Williams issued a search warrant to search 1926 Mike Allen Drive, and to seize the items requested by the warrant. The detectives then executed the warrant, seizing several firearms from a gun cabinet, including a .22 caliber Ruger pistol with a homemade silencer and other firearms and rifles; a gallon metal can fifty per cent full and plastic tubing; a hand pump with tubing; plastic bags and a plastic dish with used filters with an unknown powder in them; two one-gallon plastic jugs; two plastic jugs with used filters; the two empty cans of Coleman fuel; drug paraphernalia, including several aluminum foil

packets with residue; glass jars with unknown residue; a glass pipe with burned residue; hemostats with burned residue; plastic corners of bags with powder residue, and a metal container with a powder residue. After completing the execution of the search warrant, the detectives left the house.

The Defendant's brother and brother's fiance, Michelle Gill, also [*9] testified at the hearing. The Defendant's brother is an arson investigator employed by the Fire Marshals Office in the City of Mission, Texas, and is a certified peace officer. The brother's fiance is a detention officer employed by the United States Marshals Service for the Southern District of Texas. Both testified in substance that on August 14, 2007, the Defendant's brother received a cell phone call from the Defendant. The Defendant appeared to be very excited and was speaking loudly. The Defendant told his brother that cops were in the house and would not get out even though they were not invited. His brother asked the Defendant if the police had a warrant, and the Defendant said that they did not. According to Gill, the brother, at that point, told the Defendant to tell the police officers to "get the fuck out of the house. They have no right to be there." The brother also told the Defendant to tell the police officers that he worked with the ATF Task Force in Texas, and if they did not have a consent or a warrant, they were acting illegally and needed to leave. At this point, the Defendant's brother testified that he distinctly heard one of the people in the house state, "Well [*10] I've also worked with federal task forces and we can do what the fuck we want." The Defendant's brother testified that he stayed on the phone with the Defendant for fifteen minutes, however, this is the only statement that he heard any

of the officers make, although he heard mumbling in the background. In contrast, both Det. Balleydier and Det. Scott testified unequivocally that the Defendant gave them permission to come into the house and gave them permission to search the house for other occupants. They also testified that they allowed the Defendant to retrieve his cell phone, and to call his brother and to talk to his brother for a lengthy period of time. Other than the brother's testimony that the Defendant told him that the officers were in the house without lawful authority, no one other than the officers testified from firsthand knowledge as to what actually occurred in the residence. Obviously, the Defendant's brother is only aware of what his brother told him happened as far as consent is concerned because the brother (unlike Det. Balleydier and Scott) was not at the house and was not a witness to anything that occurred. Given the above and given the fact the officers' testimony [*11] is uncontradicted by anyone who was a firsthand witness to whether or not the Defendant initially gave the detectives consent, the undersigned accepts the testimony of the police officers that they were on the premises with the Defendant's consent and obtained his consent to make a limited search of the house. The undersigned also observed the demeanor of both Det. Balleydier and Det. Scott, and they appeared to be forthright and honest witnesses who answered questions directly both on examination of the Government's attorney and the Defendant's attorney. The undersigned concludes that they were credible witnesses. In addition, it is also uncontradicted that the agents allowed the Defendant per his request to call his brother and to talk to him for a lengthy period of time, and they

obtained a search warrant signed by an impartial judge prior to searching the premises. In short, no matter what the Defendant's brother overheard, the evidence shows that the detectives did not do "whatever they wanted."

Conclusions of Law

A. Consent to Enter the Premises and Make a Limited Search

Based on the above findings, the undersigned concludes that the Defendant invited the detectives into his house, [*12] and that Defendant's consent to allow the detectives to search the house on a limited basis was lawful. In United States v. Turbyfill, 525 F.2d 57 (8th Cir. 1975), a Kansas City police officer and a Secret Service agent went to the defendant's house to investigate a counterfeiting matter. They rang the doorbell and an individual answered the door. The officers identified themselves, and the defendant opened the inside door a few feet and stepped back. After the defendant did this, the officers opened an unlocked screen door and entered the house. After entering the house, they immediately smelled a strong odor of marijuana and observed other marijuana in the room. Eventually, the officers arrested both individuals in the house and charged them with possession of marijuana with intent to distribute the marijuana. In upholding the entry into the premises and a later seizure of the marijuana as lawful, the court stated as follows:

> Turbyfill says, however, that even if Church had authority to permit others to enter the dwelling, nothing done by Church was an invitation to the officers to enter the house and thus be in a position to see the marihuana which was first observed. An invitation [*13]

> or consent to enter a house may be implied as well as expressed. There was no error in the determination of the district court that the action of Church in the opening of the door and stepping back constituted an implied invitation to enter. The entry of the officers was lawful. Once in the house they were justified in seizing the marihuana which was in plain view in the shoe box on the table.

525 F.2d 57, 59 (8th Cir. 1975).

In United States v. Curnett, 123 Fed.Appx. 733 (8th Cir. 2005), the court was again faced with a situation where a police officer went to the door and told the defendant that he had to talk to the defendant. The defendant stood aside as if to allow the agent to enter, and the agent did enter the house. In upholding this procedure as lawful, the court stated as follows:

> Finally, Curnett argues that the district court made an error in law in finding that Curnett's act of stepping aside to let Chief Poletis into the home constituted an implied consent to the entry. We disagree. We have held that nearly identical actions constitute implied consent to entry. . .see also United States v. Smith, 973 F.2d 1374, 1376 (8th Cir. 1992) (finding consent by a resident who stepped [*14] aside, motioned officers in, even though the officers had previously drawn their weapons.) Because Curnett's actions were sufficient to allow a reasonable officer to infer consent to enter, we find the entry was lawful. Consequently, the evidence seized from Curnett's home was not the fruit of an unlawful search.

123 Fed.Appx. 733, 735.

Given the above, the undersigned concludes that the entry onto the premises was lawful. In the case now at bar, the detectives knocked on the door, *and when the Defendant answered the door,* the detectives asked the Defendant if they could come into the house. The Defendant opened the door wide, and motioned the officers to come into the house. As soon as they were in the house, the Defendant asked one of the detectives if he wished to sit on the couch in the living room. Therefore, the undersigned concludes as in Turbyfill and Curnett, supra, the Defendant opening the door wide and motioning the agents to come into the house was both an implied and actual invitation for them to enter. Therefore, their entry was lawful.

As to the limited consent to look around the house for other individuals, the undersigned concludes that the consent to search the house [*15] for this purpose was lawfully obtained. A search based on consent is lawful if it was voluntarily given. To determine whether or not a consent to search is voluntary, the totality of the circumstances surrounding the consent must be examined. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1983); United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). Among the factors used to determine whether consent is voluntary include: the degree to which the defendant cooperated with police; whether the defendant had been threatened in any way or promised anything; use or lack thereof of coercive police behavior to obtain consents, and the length of any detention of the defendant and nature of the questioning. See Schneckloth v. Bustamonte, supra;

United States v. Matlock, supra. Applying the above law to the present case, the undersigned concludes that the Defendant was not threatened in any way to obtain his consent, nor was he promised anything. Further, prior to the consent being given, the conversation between the officers and the Defendant was quite cordial, and the Defendant evidenced a cooperative attitude with them. He told the officers that he fully understood why they would want to make sure that [*16] no one else was in the house, and that they were welcome to look around for any other individuals. Therefore, based on the above, the undersigned concludes that the consent to search the house for other individuals was lawful. During this consent search, Det. Balleydier observed in plain view items which he believed were items used to manufacture methamphetamine. These items were observed in plain view while Det. Balleydier was in the process of looking for other individuals on the premises. Therefore, knowledge of these items was lawfully obtained. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

B. Defendant's Statements Prior to His Arrest

Based on the above findings, the undersigned concludes that the statements that the Defendant made prior to the Defendant's arrest were non-custodial statements. In determining whether the Defendant was in custody, the court must consider whether under the totality of the circumstances, the officers deprived the Defendant of his freedom of action in a significant way, and if a reasonable person under similar circumstances would believe that he was under arrest. See Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

In United States v. Sutera, 933 F.2d 641 (8th Cir. 1991), [*17] FBI agents executed a search warrant on the defendant's apartment, defendant's car, and on defendant's person, thoroughly searched the defendant's person and frisked him for weapons. His movement was also restricted in his apartment in that he could not go into areas that were being searched, and was accompanied by agents. He was further accompanied to a second location by agents to obtain documents. In stating that the defendant was not in custody, the court stated as follows:

> It is also relevant that Sutera was "on his own turf." Except for the brief period when Sutera and Burns drove to get the address book, Sutera was interviewed in the apartment that he was occupying. While a person may be deemed to be in custody even in his own home, it is not the type of coercive setting normally associated with custodial interrogation.

United States v. Sutera, 933 F.2d 641, 647 (8th Cir. 1991).

In United States v. Axsom, 289 F.3d 496 (8th Cir. 2002), nine FBI agents executed a search warrant at the defendant's house at 6:45 a.m. The defendant answered the door wearing only a towel and the nine agents immediately entered the house. As soon as they entered the house, they observed several firearms [*18] hanging on the walls of the premises, and at least three Samurai swords also in plain view. They first proceeded to secure the weapons. Next, the agents escorted the defendant to his bedroom where he was allowed to dress, and taken to the living room where he was told to sit down on the couch. Two agents then interviewed the

defendant for about an hour. When the defendant got up as if to get a drink of water, the agents did not allow him to get a drink, and instead told him that they would get the water for him. When the defendant wanted to go to the bathroom, he was escorted by an agent to the bathroom and not allowed to go alone. In stating the test to be followed in determining whether the defendant was in custody, the court stated:

> Custody occurs when a suspect is deprived of his freedom of action in any significant manner. . . In deciding whether a person was "in custody," we must examine both the presence and extent of physical and psychological restraints placed upon the person's liberty during interrogation "in light of whether a 'reasonable person in the suspect's position would have understood his situation' to be one of custody." . . . Thus, if Axsom believed his freedom [*19] of action had been restrained to a "degree associated with formal arrest" and his "belief was reasonable from an objective viewpoint," then Axsom was "held in custody during the interrogation."

289 F.3d 496, 500. In determining that the defendant was not in custody because of a police dominated atmosphere with the nine agents being in the house, the court stated that this was mitigated by the fact that only two agents were involved in the interview while the rest searched the premises. They further held that the fact that the defendant's movements were restricted during his interview was not enough to show that he was "in custody." In so holding, the court stated as follows:

> While nine persons participated in the execution of the search warrant, only two agents conducted the interview. . . Photographs of Axsom and federal agents *taken at or near the time* of the questioning reflect a more casual scene than a police dominated, inherently coercive interrogation. When a suspect is interrogated in the comfort and familiarity of his home, a court is less likely to find the circumstances custodial.

289 F.3d 496, 502. As to the fact that Axsom's freedom of action was limited, the court stated [*20] as follows in holding that the defendant was not in custody:

> Although the evidence exists to support the district court's finding that the agents restrained Axsom's freedom of action, his freedom was not restrained to a degree associated with formal arrest. California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983). Axsom was not handcuffed nor was he confined to one room.

Axsom, 289 F.3d 496, 502. See also United States v. Galceran, 301 F.3d 927 (8th Cir. 2002).

Based on the above law, as stated, the undersigned concludes that the Defendant was not in custody until he was formally arrested and placed in handcuffs. As in Sutera, supra, the Defendant was in his own home and seated on his couch in his living room talking to the detectives. They neither threatened him nor promised him anything in return for talking to them. He freely agreed to talk to them. In addition, when the Defendant asked if he could call his brother to ask the brother's advice on whether he should consent to a full search of the

house, the detectives allowed him to make that phone call, and he stayed on the phone with his brother for an extended period of time. There is no evidence that the detectives told him to hang up or [*21] cut his conversation short. When the Defendant refused to consent to the search of the house, the detectives told him that it was his right, but that he would have to wait outside of the house while they obtained a search warrant. It was only after the Defendant refused to move outside of the house while the premises remained in tact and a warrant was applied for, that the Defendant was arrested for possession of drug paraphernalia. Thus, the undersigned concludes that as in Sutera and Axsom, above, the Defendant was not in custody in this matter, and his movement was not restricted in any significant way consistent with formal arrest until he refused to leave his house and he was handcuffed. Therefore, the undersigned concludes that the Defendant could not reasonably believe that he was in custody while standing in his living room and talking to his brother on the phone. Therefore, the Defendant's statements prior to his arrest should not be suppressed.

C. Search Warrant for 1926 Mike Allen Drive

Based on the above findings, the undersigned concludes that sufficient probable causes exists to authorize the issuance of the search warrant for 1926 Mike Allen Drive in Washington, Missouri. [*22] For a search warrant to be valid, it must be based upon a finding by a neutral and detached judicial officer that there is probable cause to believe that evidence, instrumentalities, or fruits of a crime or contraband may be found in the place to be searched. Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed.

436 (1948); Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). The quantum of evidence needed to meet this probable cause standard has been addressed by the Supreme Court on numerous occasions:

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). Probable cause is a "fluid concept turning on the assessment of probabilities in particular factual context--not readily or even usefully reduced to a neat set of legal rules." See Illinois v. Gates, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Further, probable cause in an affidavit "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." Illinois v. Gates, at 232. [*23] Probable cause may be based on the totality of the circumstances present. All that need be shown for probable cause to search is that there is a "fair probability" that contraband or evidence of a crime will be found at the premises to be searched. See Illinois v. Gates, supra. Information from a reliable informant, without more, may provide probable cause for the issuance of a search warrant. See United States v. Pressley, 978 F.2d 1026 (8th Cir. 1982). In addition, even an anonymous tip from a crime stoppers hotline or an informant whose reliability has not been tested is a sufficient basis upon which to create probable cause as long as there

is adequate corroboration of even innocent details. See United States v. Briley, 726 F.2d 1301 (8th Cir. 1984).

Given the above law, the undersigned concludes that there was adequate probable cause stated in the affidavit for the issuance of the warrant. Initially, the detectives received information that the Defendant was involved in manufacturing or distributing methamphetamine. When they went to the residence and entered it, the detectives immediately detected the odor of burned marijuana. While looking around the home with the consent of [*24] the Defendant, the detectives observed in plain view hemostats with burned residue, tin foil with burned residue, plastic bag corners which had been cut off, mason jars with odd colored liquids, Coleman fuel or camp fuel, a lithium battery, and a can which stated that it contained denatured alcohol.

The detective, who was an experienced drug and methamphetamine investigator, explained to the judge that the tin foil packets were used to first store and later consume methamphetamine, and that plastic bag corners were cut off to package methamphetamine. As to the mason jars with unknown liquid, the detective explained to the judge that in the process of manufacturing methamphetaine, chemicals are altered and processed in mason jars leaving unknown liquids. The detective also explained to the judge that denatured alcohol, camp fuel, and lithium batteries are necessary ingredients in the manufacture of methamphetamine. The undersigned concludes that the general information that the Defendant was involved in the manufacture and sale of

methamphetamine, along with the detective's observation of tin foil with burned residue, plastic bag corners, a lithium battery, mason jars with unknown liquid, [*25] a can of denatured alcohol, and camp fuel (all of which are necessary ingredients for the manufacture of methamphetamine) leads the undersigned to conclude that there is at least a "fair probability" that evidence of manufacture or use of methamphetamine or other drugs would be found in the Defendant's home. This "fair probability" becomes even stronger when the smell of burned marijuana and the hemostats with burned residue are added to the probable cause. See United States v. Briley, supra; Illinois v. Gates, supra.

In addition, the warrant was executed in a lawful manner. "A lawful search extends to all areas and containers in which the object of a search may be found." United States v. Weinbender, 109 F.3d 1327, 1329 (8th Cir. 1997). In this case, any items which the agents observed when looking for marijuana, methamphetamine, or any utensils to make those items, could be seized as long as it was observed during the search and its unlawful character was apparent. See Coolidge v. New Hampshire, supra. This obviously applies to the handgun and the silencer since the weapon itself is illegal and is contraband.

In the alternative, the evidence seized during the search warrant should [*26] not be excluded even if there was not probable cause for the issuance of the warrant if the officers executed the warrant with objectively reasonable, good faith reliance on the judicial officer's determination of probable cause. See United States v. Leon, 468 U.S. 897, 920-22, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Certainly in this

matter, the officers had a good faith belief that probable cause existed and were acting on a good faith reliance on the judge's determination of probable cause. 1

FOOTNOTES

1 The Defendant claims that the good faith exception can not be considered because the affidavit contains intentionally false or recklessly false statements. In this regard, the Supreme Court has held that the good faith exception does not extend to warrants issued in reliance on intentionally, deliberately, or recklessly false affidavits. See United States v. Leon, supra. In formulating the standard to be used in this circuit for determining intentionally false statements, the Eighth Circuit Court of Appeals has stated as follows:

> To succeed in a Franks type challenge of the validity of a search warrant, a Defendant must establish by a preponderance of the evidence that the affiant either intentionally or with reckless disregard [*27] for the truth included a false statement within a search warrant affidavit.

United States v. Clapp, 46 F.3d 795, 799 (8th Cir. 1995). For an affidavit to be truthful does not mean "truthful in a sense that every fact recited in the warrant is correct." Clapp, supra at 799. This is so because "affidavits are often drafted by non-lawyers in the midst and haste of a criminal investigation." In order to determine whether or not a false statement in an affidavit was intentional or reckless, the Defendant must show that "the affiant in fact entertained serious doubts as to the truth of the affidavit or had reason to doubt the accuracy of the information contained therein." United States v.

Clapp, 46 F.3d 795, 801. In Clapp, supra, the court held that two statements in the affidavit were misleading, inappropriate and inaccurate, but nevertheless were not intentional or reckless, and therefore did not rise to intentional deletion or inclusion of false material facts in an affidavit. Given the above, the undersigned concludes that there were no intentionally or recklessly false statements made in the affidavit. The Defendant states that no plastic bag corners were found during the search of [*28] the house and, thus, the detective intentionally made a false statement in saying in the affidavit that he observed baggie corners. However, item "G" of the inventory states that "plastic bag with corner missing" and aluminum foil with burned residue were found during the search. Further, item "E" of the inventory states that "plastic corner bags with powder residue" were found during the search. The Defendant also states that because the detective stated he smelled burned marijuana and no marijuana was found during the search of the house, this shows that the detective intentionally falsely stated that he smelled burned marijuana. However, there is nothing to contradict that the detective smelled burned marijuana, and the undersigned concludes that there could be innocent reasons for this, including that the marijuana was being smoked using the hemostats with burned residue and then flushed down the toilet. At any rate, the undersigned concludes that there is no indication that the statement was intentionally or knowingly false or that the detective had any serious doubts about its truth or had any reason to doubt the accuracy of what he stated. See United States v. Clapp, supra.

Further, [*29] the hemostats with burned residue were found on the sink in the bathroom nowhere near any fishing equipment which was eventually observed by the detective during the execution of the search warrant. Under these circumstances, the undersigned concludes the failure to include Defendant's statement that he used the hemostats with burned residue to fix lures does not show that the statement in the affidavit that the hemostats with burned residue were found in the bathroom was a knowingly false or reckless statement.

Conclusion

Therefore, based on the above, the undersigned concludes that the Defendant's motion to suppress evidence and motion to suppress statements should be denied.

* * *

In accordance with the Memorandum above,

IT IS HEREBY RECOMMENDED that the Motion to Suppress Statements (Doc. # 20), and Motion to Suppress Evidence (Doc. # 21) be denied.

Further, the parties are advised that they have until July 9, 2007, in which to file written objections to this recommendation and determination. Failure to timely file objections may result in waiver of the right to appeal questions of fact. Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990).

Finally, the trial of this matter is set on Tuesday, [*30] September 4, 2007 at 9:30 a.m. before the Honorable Henry E. Autrey, United States District Judge, Courtroom 10-North.

/s/ Terry I. Adelman

UNITED STATES MAGISTRATE JUDGE

Dated this 26<th> day of June, 2007.

APPENDIX E
USDC ORDER ADOPTING MAGISTRATE R&R DATED 7-25-07

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
Case No. 4:06CR761 HEA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAY SCOTT PATTERSON,)
)
Defendants.)

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on the Memorandum and Recommendation, [Doc. No. 31], of United States Magistrate Judge Terry I. Adelman, pursuant to 28 U.S.C. § 636(b), in which Judge Adelman recommends that Defendant's Motion to Suppress Statements, [Doc. No. 20] and Motion to Suppress Evidence, [Doc. No. 21], be denied. Defendant has filed Objections to the Memorandum and Recommendation.

When a party objects to a magistrate judge's report and recommendation, the Court must conduct a de novo review of the portions of the report, findings, or recommendations to which the party objected. See United States v. Lothridge, 324 F.3d 599, 600 (8th Cir.2003) (citing 28 U.S.C. § 636(b)(1)). This includes a de novo review of the magistrate's findings of fact, including any credibility - 2 - determinations. Id. The court has reviewed the entire record, including listening to the audio recordings of the hearing held on May 2, 2007.

Discussion

Initially, Defendant objects to Judge Adelman's finding that Defendant implicitly consented to the warrantless entry into his residence located at 1926 Mike Allen Drive in Washington, Missouri. Defendant argues that Judge Adelman's finding that Defendant "opened the door wide, and motioned for the officers to come into the house" is not supported by the evidence adduced at the suppression hearing because the witnesses were unable to describe the physical gesture from which they claimed they had obtained invitation. Based on this argument, Defendant urges suppression of his statements prior to his formal arrest as tainted fruits of the poisonous tree. This objection is patently without merit when considered with all the attendant circumstances. There is absolutely no evidence of forced entry into the home. Detective Balleydier testified that Defendant came to the door. When the detectives asked if they could come in, they were granted entry. The failure to describe a gesture indicating consent to enter does not obviate the fact that the detectives were in fact allowed into the residence without force or refusal by defendant. Furthermore, the evidence establishes that Defendant was initially cooperative with the detectives. He asked one of the detectives to sit down on the - 3 - couch in the living room. Detective Scott told Defendant who they were and why they were there. Defendant agreed at that time to talk with them.

Defendant's objection fails because it relies on events which occurred after Defendant consented to the entry of his residence. After admission was given by Defendant without objection, the detectives asked

if they could look around to see if there was anyone else in the house. Defendant consented. During the cursory look around the house, Detective Balleydier observed items which he knew from his experience to be used in the manufacture or use of methamphetamine. The detectives asked to search the house. It was only at this time did Defendant voice any type of concern and advised the detectives that he would not allow a search until after he spoke with his brother. The detectives accommodated this request and stopped all inspection of the house. Thus, it was only subsequent to allowing the detective into the residence that Defendant refused consent. Although Defendant did not verbalize his consent, allowing entry into the house, asking the detective to sit on the couch, and allowing the cursory look through the house clearly demonstrates Defendant's voluntary consent to their entry. Defendant did not present any evidence of forced entry or intimidation. In fact, there was no evidence to even imply that Defendant did not voluntarily allow the detective entry. See United States v. Turbyfill, 525 F.2d 57 (8th Cir. 1975)("An invitation or consent to - 4 - enter a house may be implied as well as expressed. There was no error in the determination of the district court that the action of Church in the opening of the door and stepping back constituted an implied invitation to enter. The entry of the officers was lawful.").

Defendant argues that the testimony of Jonathan Patterson and Michelle Gil establish that consent to enter the house was not given. Their testimony, however, is based solely on Defendant's conversation with Jonathan Patterson after the detectives asked to search the house, not enter it.

The detectives were already allowed in and it was with respect to their request to search that Defendant sought to, and indeed did, consult his brother Jonathan Patterson. This testimony does not to controvert the testimony of Detective Balleydier in any manner.

Because the detectives were allowed entry by Defendant, and therefore were validly in the residence, any statements made by Defendant at this time are not suppressible as "fruits of the poisonous tree." Defendant's objection is overruled. Defendant also argues that the search warrant for Defendant's home was not based on probable cause. Defendant argues that the affidavit in support of the warrant contained information which was insufficient to suggest that contraband or evidence of a crime could be found at Defendant's home.

The warrant was not issued solely on the basis of this information. As the - 5 - record clearly establishes, the detectives originally approached Defendant with this information. Defendant allowed the officers in. Once in, they conducted a valid look through the house to determine if anyone else was in the residence. Based on what was observed in plain view, the detectives were able to support the affidavit with numerous items indicating that contraband and evidence of a crime could be found at Defendant's home. As discussed above, Defendant's focus on these items as fruits of an illegal entry is incorrect.

Likewise, Defendant's argument that the remaining allegations in support of the warrant application are insufficient to support a finding of probable cause for the issuance of the warrant is unavailing. The facts upon which the search warrant was issued support a finding of probable cause for its

issuance. Probable cause means a "fair probability that . . . evidence of a crime will be found in a particular place," given the circumstances set forth in the affidavit. United States v. Horn, 187 F.3d 781, 785 (8th Cir. 1999) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). When reviewing the legal sufficiency of the basis for the issuance of a search warrant, the Court must determine whether the issuing judge had a substantial basis for concluding that probable cause existed for the issuance of the warrant. United States v. Luloff, 15 F.3d 763, 768 (8th Cir. 1994). There must be a fair probability, based on the totality of circumstances described in the officer's affidavit, and the - 6 - veracity and basis of knowledge of the persons supplying hearsay information, that contraband or evidence of a crime will be found in a particular place. United States v. Coleman, 349 F.3d 1077, 1083 (8th Cir. 2003).

Probable cause exists when, "given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place." Kleinholz v. United States, 339 F.3d 674, 676 (8th Cir.2003) (internal quotations omitted). As detailed in Judge Adelman's Memorandum, in support of the application, Detective Balleydier set forth all of the items the detectives observed, and his opinion of their significance based on his experience as a drug and methamphetamine investigator. Taken together, these items are indicative of criminal activity, i,e,, the manufacture of methamphetamine. Defendant's urgence that the items set forth in the application are conclusions that are insufficient, fails to recognize Detective Balleydier's experience as a methamphetamine investigator who is intimately

familiar with the methods and materials used in the manufacture and use of the illegal drug. Defendant is reminded of the standard for issuance of a warrant: probable cause, which as Judge Adelman aptly discussed, must be seen and weighed not in terms of library analysis, but as by those versed in the field of law enforcement. Gates, 462 U.S. at 232.

Defendant takes issue with the conclusion that no knowingly false or reckless statements were made by Detective Balleydier. Defendant continues to argue that Detective Balleydier concealed material facts from the warrant court and misled that Court. This Court agrees completely with Judge Adelman's determination. Defendant has presented no evidence to controvert Detective Balleydier's testimony that he smelled burned marijuana. Furthermore, the location of the hemostats with burned residue, in the bathroom and nowhere near any fishing equipment, does not establish that the detective intentionally misled the warrant court by not including in the affidavit that Defendant made a statement that he used the hemostats to fix lure. The location of the hemostats with the burned residue in the bathroom is consistent with their being evidence of methamphetamine manufacturing and use.

Finally, Defendant argues that the Firearms must be suppressed because they were not listed as items to be included in the search. Judge Adelman's conclusion that these firearms could be confiscated is supported by the plain view doctrine. "The plain view doctrine permits law enforcement officers to seize evidence without a warrant when (1) the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly

viewed, (2) the object's incriminating character is immediately apparent, and (3) the officer has a lawful right of access to the object itself." United States v. Weinbender, 109 F.3d 1327, - 8 - 1330 (8th Cir.1997); United States v. Collins, 321 F.3d 691, 694 (8th Cir.2003); U.S. v. Poe, 462 F.3d 997, 999 -1002 (8th Cir 2006).

While Defendant takes issue with Judge Adelman's finding and conclusion that the handgun and silencer was illegal contraband, Defendant's objection is misplaced: "The 'immediately apparent' requirement means that officers must have 'probable cause to associate the property with criminal activity.' " United States v. Hatten, 68 F.3d 257, 261 (8th Cir.1995), cert. denied, 516 U.S. 1150 (1996), (quoting United States v. Garner, 907 F.2d 60, 62 (8th Cir.), cert. denied 498 U.S. 1068 (1991)). "Probable cause demands not that an officer be 'sure' or 'certain' but only that the facts available to a reasonably cautious man would warrant a belief 'that certain items may be contraband or stolen property or useful as evidence of a crime.' " Id., (quoting Garner, 907 F.2d at 62, in turn quoting Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983)).

Here, the incriminating character of the handgun with the homemade silencer was immediately apparent to the detectives. "The possession of . . . a homemade silencer is illegal.. .Thus, the seizure of the homemade silencer was justified under the plain view doctrine." Weinbender, 109 F.3d at 1330-31. Defendant's objection is therefore overruled. - 9 -

Conclusion

Having conducted a de novo review of the Motion and the record before the court, Defendant's objections are overruled. The Court, therefore will adopt Judge Adelman's Recommendations.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Suppress Statements, [Doc. No. 20], is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Suppress Evidence, [Doc. No. 21], is DENIED.

Dated this 25th day of July, 2007.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX F
USDC ORDER DENYING CONTINUANCE
DATED 9-6-07

VOLUME III EXCERPT
1
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 4:06-CR-00761 HEA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JAY SCOTT PATTERSON,)
)
Defendant.)

EXCERPT OF JURY TRIAL PROCEEDINGS
VOLUME III
BEFORE THE HONORABLE HENRY E. AUTREY
UNITED STATES DISTRICT JUDGE
SEPTEMBER 6, 2007

APPEARANCES:
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VOLUME III EXCERPT
* * * * * * * * * * *

[2]

MR. CARLSON: We need to approach please.

THE COURT: Uh-huh.

(A Bench Conference Was Held On the Record and Outside of the Hearing of the Jury As Follows:)

THE COURT: Yes, sir.

MR. CARLSON: Judge, I'm asking that this trial now be continued to tomorrow so that I can obtain the attendance of Donna Johnson who is now in the hospital in Washington, Missouri and has been for a couple days. I need her testimony because her testimony is in great support of Mr. Johnson. The State is trying to cast doubt on Mr. Johnson's veracity. The fact that she would give the same testimony and add things that Mr. Johnson cannot know, does not know, are very important now by virtue of the cross examination he's done on this witness. My request is for a continuance until tomorrow so I can put Donna Johnson on the stand.

THE COURT: And what testimony would you propose to elicit in support of your statement?

MR. CARLSON: That they made multiple calls to the police department because these people that looked like they were on drugs were harassing them in the middle of the night asking for Laura based upon the fact that they associated a blue Avalanche with Laura.

MR. MEYER: First of all, I don't know what time frame he is talking about. Secondly, we approached the Court [3] this morning prior to trial. He advised the Court of what her testimony would be. I would not object to her talking about that she was afraid when these people came. I certainly wouldn't care if she made the statement through him that they called the police because he was with her

when they called the police. He did not ask his client the question that he told the Court he was going to ask him that would not have been objected to. There is no reason.

MR. CARLSON: What question is that?

MR. MEYER: That she was scared. You said this morning that he was going to testify that she was scared when these people came to the door.

MR. CARLSON: You are right. I forgot to ask that question.

MR. MEYER: And I said that is fine because she is unavailable and it's a hearsay exception.

MR. CARLSON: You are right.

MR. MEYER: If we are talking about the two-month period, Your Honor, prior to this incident, if we are even going to go there --

MR. CARLSON: You're right, I've been ineffective in that regard.

MR. MEYER: So he is making a record for his appeal.

THE COURT: I don't know that you were ineffective, but you forgot a question. Lawyers routinely forget [4] questions. The question that you forgot to ask is not fatally material. It is not the kind of statement that if you would have asked it and if the witness would have given the answer, that it would likely have made a material difference in the outcome of the case. It is not a major deal. Now what would have been a major deal is if Mrs. Robinson came in and testified that she saw someone on a regular basis other than the defendant, you know, cooking meth. That would be a major deal. If you forgot to bring that witness in and ask that question, that would be problematic.

MR. CARLSON: Let me check my notes.

THE COURT: I'm inclined to disallow the request, Mr. Carlson. I don't see anything that this witness would say. I don't think Mrs. Johnson is going to say anything that is either going to greatly bolster what her husband said or have any effect in rehabilitating him if, in fact, he had been impeached in any material way by the Government. You know, I think the testimony is what the testimony is, and whether one witness says it or two or three or five, the jury is going to believe it or disbelieve it at this juncture.

MR. CARLSON: But if two of them say it, Judge, they are more inclined to believe it than if just one says it, and she will very, very strongly bolster her husband's testimony.

THE COURT: But all of us here in the trenches know, Mr. Carlson, that more likely than not, that isn't the case. [5] More likely if two people say it, that gives more for somebody to pick at which affects the credibility of the first person who might have been a better witness to begin with.

MR. CARLSON: Judge, I'm willing to roll those dice.

MR. MEYER: And he said that he saw everything. He looked out his window. Probably he saw more than she ever saw.

THE COURT: At this juncture, fellas, it is going to be my conclusion that we continue to forge ahead.

MR. MEYER: Let's rock and roll.

MR. CARLSON: Okay. Judge, I'm going to ask for a short recess. I may be closing at this time, but I need to speak with my client.